IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No.....

THE HUDSON MOTOR CAR COMPANY,
a Michigan Corporation,
Petitioner,
vs.
GUSTAV C. HERTZ, Administrator c. t. a. of the
Estate of Lois Crane Hertz,
Respondent.

No.....

MOTOR WHEEL CORPORATION,
a Michigan Corporation,
Petitioner,
vs.
GUSTAV C. HERTZ, Administrator c. t. a. of the
Estate of Lois Crane Hertz,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF COURT BELOW

The opinion in the Circuit Court of Appeals (R. 106), is reported in 121 Fed. (2nd) 326.

II.

JURISDICTION

1. The date of the judgments to be reviewed is June 25th, 1941 (R. 105, 106). A petition for rehearing was filed by petitioners within the required time (R. 121). This petition was denied on October 7th, 1941 (R. 149).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28, United States Code, Section 347 (a); Judicial Code, Section 240, amended.

3. The basis of original jurisdiction in the District Court is diversity of citizenship, respondent being a resident of Virginia and petitioners being Michigan corporations (R. 6). Respondent claimed damages in excess of $3,000 (R. 9) and secured a verdict against petitioners for $9,522.55 (R. 62). The District Court entered a judgment in that amount against both petitioners (R. 63). The appeals to the Circuit Court of Appeals were taken within the time required by law (R. 87, 88). That Court entered final judgments on June 25th, 1941, affirming the judgment entered by the District Court. This petition for a writ of certiorari is being filed within the time required by law after the denial of petitioners' application for rehearing.

4. The cases believed to sustain the jurisdiction are as follows:

Federal Trade Commission v. Pacific States Paper Trade Association, 273 U. S. 52.

Stringfellow v. Atlantic Coast Line R. Co., 290 U. S. 322.

Erie Rd. Co. v. Tompkins, 304 U. S. 64.

Ruhlin v. New York Life Insurance Co., 304 U. S. 202.

III.

STATEMENT OF THE CASE

This has already been stated in the preceding petition under I (pp. 2-8), which is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that the enactment of the limitation now found in Section 5786 of the Code of Virginia repealed the limitation in Section 5787 by implication, and that the limitation in Section 5786 is applicable to this action.

2. The Circuit Court of Appeals erred in holding that Section 5786 should be construed to mean that the limitation therein does not commence to run until the appointment of an administrator for the decedent.

V.

ARGUMENT

SUMMARY OF THE ARGUMENT

Point A. The enactment of the limitation in Section 5786 by the amendment of 1926 did not repeal by implication the limitation in Section 5787 for two reasons: First, the language of the amendment itself, when considered with a certain Virginia decision, indicates that the Legislature had no intention to repeal the limitation in Section 5787. Second, the two limitations are not inconsistent and irreconcilable because they relate to different subjects. The limitation in Section 5786 applies only to actions brought against the estates of deceased wrongdoers, whereas the limitation in Section 5787 applies only to actions to recover damages for wrongful death. Inasmuch as respondent did not bring this action within the time limited in Section 5787, the action is barred.

Point B. If petitioners are incorrect in the contentions stated in Point A, the only limitation applicable to this action is that now found in Section 5786. A consideration of Section 5809, which is set forth in full in the preceding petition, indicates that Section 5786 should be construed to mean that a cause of action for wrongful death accrues upon death and not at the time an administrator is appointed for the decedent. This question has not been expressly decided in any Virginia decision but the Courts of other jurisdictions unanimously support petitioners' contention. This action is barred inasmuch as it was not started within one year after the death of Mrs. Hertz.

POINT A

The enactment of the limitation now found in Section 5786 of the Code of Virginia did not repeal by implication the limitation in Section 5787, and the only limitaton applicable to this case is that found in Section 5787. This action is, therefore, barred inasmuch as it was not commenced within one year after the death of Mrs. Hertz.

In the first place, it is established, beyond any doubt, that the limitation in this Virginia statute creating a right of action for wrongful death, governs this situation rather than the general statute of limitations of Michigan. While the statute of limitations of the forum is generally applicable to causes of action arising in other States, it is established beyond any doubt that where a right of action is created by a statute of another State and the enforcement of that right of action is limited by such statute to a definite period, that limitation governs all actions brought in the forum based upon such statute.

> *Wingert v. William L. Carpenter, Circuit Judge,* 101 Mich. 395.

It is well settled in Virginia that a cause of action for personal injuries negligently inflicted, abates upon the death of the injured person, but that the statute we are considering creates a new cause of action which is in no sense a derivative action.

> *Anderson v. Hygeia Hotel Co.,* 92 Va. 687.
> *Virginia Electric & Power Co. v. Decatur, Administrator,* 173 Va. 153.

It is clear, therefore, that if the present action is barred according to the law of Virginia, it should be deemed to be barred by this Court.

As originally enacted, the Wrongful Death Statute of Virginia contained only one limitation, that now found in Section 5787. There has been no change in that limitation to the present time except that originally it was 12 months instead of one year. It now provides as follows:

> "Every such action shall be brought by and in the name of the personal representative of such deceased person and within one year after his or her death, * * *."

The amendment of 1926 to Section 5786 consisted in the addition of the following language, which now appears as the second sentence of the first paragraph and the second paragraph of that section:

> "And any right of action which may hereafter accrue by reason of such injury done to the person of another shall survive the death of the wrongdoer, and may be enforced against his executor or administrator, either by reviving against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his personal representative after his death whether or not the death of the wrongdoer occurred before or after the death of the injured party.
>
> "Every action under this section shall be brought within one year next after the right to bring same shall have accrued, notwithstanding the provisions of section fifty-eight hundred and eighteen."

It is apparent that by this amendment, the Legislature intended to prevent the abatement of a cause of action for wrongful death by reason of the death of the wrongdoer. A consideration of the Virginia law concerning the effect of the death of the wrongdoer, as it existed prior to the enactment of this amendment, together with Section 5818 referred to therein, will plainly demonstrate to the Court

the purpose of the first portion of this amendment and the limitation.

At least since the enactment of the Code of 1887, the Death Act has always contained a provision aimed to prevent the abatement of a cause of action for wrongful death resulting from the death of the wrongdoer. In the Code of that year it appeared in Section 2906 and the same provision has been carried over into the present Code in identical language as Section 5790. The words used are these:

> "The right of action under Sections 5786 and 5787, shall not determine, nor the action, when brought, abate by the death of the defendant, or the dissolution of the corporation when a corporation is the defendant; * * *."

In 1910, the Supreme Court of Appeals of Virginia was called upon to construe this provision in the case of *Beavers' Administratrix v. Putnam's Curator*, 110 Va. 713. It appeared in that case that the wrongdoer died before his victim and the question was raised whether Section 2906 of the Code, the predecessor of Section 5790, prevented the abatement of the action. The Court held that it did not, for the reason that when the plaintiff's decedent died and a cause of action thereby accrued in favor of her administratrix, there was no one in being who could be sued because at common law the administrator could not be sued upon such a cause of action and no statute created an independent cause of action against the administrator. The Court stated that Section 2906 did not create a new cause of action but merely attached itself to such causes of action as were created by Sections 2902 and 2903, the predecessors of 5786 and 5787. The Court said:

> "At common law it is conceded that personal actions died with the person and could not be revived either by or against the personal representative; * * *.
>
> "There can be no doubt that at common law the action in this case could not have been maintained, * * *."

The reasons for the decision of the Court in that case may be unimportant. The fact is that the Court decided that where the wrongdoer dies first, that is, before his victim, Section 2906 and, therefore, its successor, Section 5790, does not prevent the abatement of a cause of action for wrongful death upon the death of the wrongdoer.

In enacting Section 2906, the Legislature of Virginia may have intended that no cause of action for wrongful death should abate by reason of the death of the wrongdoer whether the wrongdoer died before his victim or afterwards. In spite of that section and the apparent intention of the Legislature, the Supreme Court of Appeals held that Section 2906 did not prevent the abatement of a cause of action for wrongful death where the wrongdoer died before his victim.

The first portion of the amendment of 1926 clearly fills the gap created by the decision of the Court in *Beavers' Administratrix v. Putnam's Curator, supra.* That sentence plainly declares that the cause of action for wrongful death shall not abate upon the death of the wrongdoer, whether the wrongdoer dies before or after his victim. That conclusion is supported by *Burks on Pleading and Practice* (3rd Ed., 1934) p. 247. The petitioners respectfully contend, therefore, that it is perfectly clear that the Legislature, in enacting the first portion of the amendment of 1926, intended to fill the gap created by that decision.

Petitioners contend that the remainder of the amendment of 1926, the limitation, was not intended to repeal, modify nor have any effect whatever upon the limitation in Section 5787. The reasons in support of this contention will be briefly stated, after which they will be discussed in some detail.

1. The first portion of the amendment of 1926 prevents the abatement of causes of action in the following situations:

(a) The injured person survives and the wrongdoer dies.

(b) The injured person dies but not as a result of the wrongful act, and the wrongdoer dies. (The right of action of the injured person in this situation survives to his personal representative by reason of an amendment to Section 5790 which was enacted in 1920.)

(c) The injured person dies as a result of the wrongful act and the wrongdoer dies.

Prior to the amendment of 1926, in all three of these situations, the cause of action abated upon the death of the wrongdoer except in the third class when the injured person died first.

2. The limitation was inserted in the amendment of 1926 to prescribe, in actions for personal injuries and wrongful death brought against the personal representatives of deceased wrongdoers, a uniform limitation of one year in all situations thereby preventing Section 5818 from extending the limitation in any situation to five years.

3. The limitation created by the amendment of 1926 was intended to apply only to actions of all three classes brought against the estates of deceased wrongdoers. That

limitation was not intended to have any effect whatever upon the limitation in Section 5787.

Each of these three points will be discussed as briefly as possible.

1.

The first portion of the amendment of 1926 prevents the abatement of causes of action in the following situations:

(a) The injured person survives and the wrongdoer dies.

(b) The injured person dies but not as a result of the wrongful act, and the wrongdoer dies.

(c) The injured person dies as a result of the wrongful act and the wrongdoer dies.

The reasons for that conclusion will be briefly stated:

(i) The title of the amendatory act of 1926 is as follows:

> "An Act to amend and re-enact Section 5786 of the Code of Virginia, which section is in chapter 236 of the said Code, in relation to actions for injuries."

The language used by the Legislature in this title clearly indicates that the amendment was intended to apply to all actions for injuries whether the injured person died as a result of the accident or not.

(ii) The first few words of the first portion of the amendment of 1926 are as follows:

> "And any right of action which may hereafter accrue by reason of such injury (referring to an injury caused by the wrongful act, neglect or de-

> fault of any person or corporation) done to the person of another shall survive the death of the wrongdoer, * * *."

The language just quoted in the amendment itself indicates that its operation is not to be restricted to those situations in which the injured person died as a result of the wrongful act, but that it is to extend also to the situations in which the injured person did not die and to those in which he did die but not as a result of the wrongful act.

(iii) The language of the limitation itself points to the same conclusion. The first words of that limitation are as follows:

> "Every action under this section shall be brought within one year next after the right to bring same shall have accrued, * * *."

By using the words, "Every action under this section shall be brought * * *," it is apparent that the Legislature had in mind that actions could be brought under and by reason of the terms of the first portion of the amendment of 1926 which could not have been brought prior to that time under the Wrongful Death Act. In other words the Legislature intended by the use of those words that actions might be brought under the first portion of that amendment independently of the original portion of Section 5786 and Section 5787, in those situations in which the injured person did not die and in those in which he did die but not as a result of the wrongful act.

It is apparent that this is so upon a careful consideration of the Wrongful Death Act as it existed prior to the amendment of 1926. It will be noted that Section 5786 simply stated that whenever the death of a person shall be caused by the wrongful act of another, the person who would have been liable if death had not ensued shall be

liable to an action for damages. That section did not state who is entitled to recover these damages nor what the elements of damages are. The section simply stated that the wrongdoer shall be liable in damages for his wrongful act. Therefore, Section 5786 did not create a cause of action in and of itself.

Section 5787 provided in 1926, and still provides, that every such action shall be brought by and in the name of the personal representative of such deceased person within one year after his or her death. That section goes on to state the elements of damages and the amount of recovery.

It is clear, therefore, that both Sections 5786 and 5787 were necessary to create a cause of action for wrongful death. The first section stated who shall be liable and the second section stated who is entitled to recover and the amount of such recovery.

This conclusion is supported by a portion of the language of Section 5790 which has never been modified:

> "The right of action under sections 5786 and 5787, shall not determine, nor the action, when brought, abate * * *."

Petitioners respectfully contend, therefore, that the first portion of the amendment of 1926 was intended to prevent the abatement of all three causes of action. Inasmuch as Sections 5786 and 5787 created a cause of action of the third class only, the petitioners contend that the first portion of the amendment of 1926 created new causes of action of the first two classes or prevented the abatement of those causes of action. At least, it may be said that causes of action of the first two classes have become enforceable by reason of this amendment, whereas they would have abated prior to its enactment by reason of the death of the wrongdoer.

When the Legislature used the words in the amendment, "Every action under this section shall be brought * * *," it had in mind all three of these classes of actions.

While at first the Court may feel that it was incongruous on the part of the Legislature to insert provisions relating to personal injuries in a statute creating a cause of action for death by wrongful act, this apparent misplacing of these provisions disappears upon further consideration of the statutes. It has already been pointed out that the first clause of Section 5790 as it was construed by the Supreme Court of Appeals, was modified, and certainly clarified, not by an amendment of itself, but by the first portion of the amendment of 1926 to Section 5786. Furthermore, Sections 5786 and 5787 have not been officially designated as the "Wrongful Death Act" by the Legislature of Virginia. Those two sections have simply been a portion of a chapter of the Code entitled: "Action for injuries." The first portion of the amendment of 1926, actually does relate to the death of one of the parties, namely, the wrongdoer, and it is really not misplaced at all. Finally, the Court will be aware that in 1928 the Legislature amended Section 5790 to bring about more clearly what was attempted by the first portion of the amendment of 1926, namely, the prevention of the abatement of all causes of action for personal injuries by reason of the death of the wrongdoer. It is significant, however, that by its amendment of 1928 to Section 5790, the Legislature did not place any limitation upon actions against the estates of wrongdoers, because it undoubtedly felt that the limitation in the 1926 amendment was adequate.

2.

The limitation was inserted in the amendment of 1926 to Section 5786 to prescribe, in actions for personal injuries and wrongful death brought against the personal representatives of deceased wrongdoers, a uniform limitation of one year in all situations thereby preventing Section 5818 from extending the limitation in any situation to five years.

Having in mind that the first portion of the amendment of 1926 prevents the abatement of all personal injury and death actions upon the death of the wrongdoer, petitioners respectfully contend that the purpose of the limitation in the amendment of 1926 is quite clear upon a study of the section of the Code referred to therein, Section 5818.

For the sake of convenience, the limitation in the amendment of 1926 and Section 5818 will be restated. The limitation is as follows:

> "Every action under this section shall be brought within one year next after the right to bring same shall have accrued, notwithstanding the provisions of section fifty-eight hundred and eighteen."

Section 5818 uses these words:

> "Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that if a party die, it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring same shall have accrued."

Section 5818 is a portion of the general statute of limitations of Virginia. It plainly declares that every personal

action, for which no limitation is otherwise prescribed, may be brought within five years next "after the right to bring the same shall have accrued," if the action be for such a matter that if one of the parties to it dies, the action can be brought against his personal representative.

Aside from the amendment of 1926 to Section 5786, there is no statute in Virginia which specifically prescribes a limitation upon personal injury actions, except the Death Act itself which establishes a limitation only in the third of the three classes heretofore mentioned in this argument, that is, in the situation in which the injured party dies as a result of the accident. There is no statutory limitation at all in the Code of Virginia upon the enforcement of either of the first two classes of causes of action except that contained in the amendment of 1926. Section 5818 would have the effect of creating a limitation of five years upon the enforcement of those two classes of causes of action, inasmuch as the first portion of the amendment of 1926 provides for the survival of those causes of action against the personal representatives of the wrongdoers.

It is clear, therefore, that, by providing in the 1926 amendment that the limitation upon actions brought under that amendment should be one year notwithstanding the provisions of Section 5818, the Legislature plainly declared that it intended the limitation to be one year and not five years.

3.

The limitation created by the amendment of 1926 was intended to apply only to actions brought against the estates of deceased wrongdoers. That limitation was not intended to have any effect whatever upon the limitation contained in Section 5787.

If petitioners are correct in the contentions stated under headings 1 and 2, it is respectfully submitted that it is clear that the Legislature of Virginia, by enacting the limitation found in the amendment of 1926, had no intention whatever of altering or in any way modifying the limitation found in Section 5787. With the foregoing considerations in mind, and having in mind particularly the fact that these two limitations are found in consecutive sections of the Code, petitioners contend that the Legislature actually intended that each of these two limitations should be sovereign in its own sphere: that in Section 5787 to be a limitation upon the right to bring actions for wrongful death, and that in the amendment of 1926 to Section 5786 to be a limitation upon the right to bring actions against the personal representatives of deceased wrongdoers.

If these contentions are correct, it is apparent that there is no conflict whatever between these two limitations. They are not irreconcilable at all, as they were not intended by the Legislature to be applicable to the same subject matter. Petitioners contend, therefore, that it is not necessary to attempt to reconcile them. Instead, giving full effect to the intention of the Legislature, these two limitations should be deemed to be sovereign in their respective spheres.

To demonstrate to the Court that each of these limitations can be given full effect in all situations, petitioners desire to briefly discuss their application to actions based upon the three classes of causes of action heretofore considered.

1. In actions in which the injured person does not die, Section 5787 has no application and the action must be brought against the personal representative of the wrongdoer within one year after the accrual of the right to bring the same.

2. When the injured person dies but not as a result of the wrongful act of the wrongdoer, it is also clear that the limitation of Section 5787 has no application and that the action must be brought within the same period as actions of the previous class, except that Section 5809 operates to extend the time for one year.

3. Where the injured person dies as the result of the wrongful act, his cause of action is based upon Sections 5786 and 5787. It is clear, therefore, that the limitation contained in the latter section is applicable and the action must be brought within one year after the death of the injured person. In the event of the death of the wrongdoer, an action previously commenced against him may be revived or a new action may be commenced against his personal representative. The limitation in Section 5786, however, provides that such an action must be brought against the personal representative of the deceased wrongdoer within one year after the right to bring the same shall have accrued.

Having in mind the fact that the limitation in Section 5786 was intended as a limitation upon actions against the personal representatives of deceased wrongdoers, an action for wrongful death brought against the personal representative of a deceased wrongdoer is simply subject to two limitations: It must be commenced within one year after the death of the injured party and within one year after the right to bring the action accrues against the personal representative of the deceased wrongdoer.

It is clear, therefore, that the Legislature intended, when it enacted the amendment of 1926, that the limitation therein should have no application to actions like the present in which the wrongdoers are still alive or in existence as corporations. It is equally clear that the Legislature at that time had no intention whatever of repealing or in any way modifying the limitation in Section 5787.

The majority opinion of the Circuit Court of Appeals cites certain Virginia decisions, however, which declare that when the Legislature amends a statute by adding a new provision, the presumption is that the Legislature intends to make some change in the existing law. One of these is *Richmond v. Sutherland,* 114 Va. 688. Petitioners desire to quote a portion of the opinion of the Court in that case in order that the presumption referred to by the majority of the Court in its opinion in the present case, may be seen in its proper perspective among the general principles relating to statutory construction. The Court said in the Richmond case:

> "In construing a statute the paramount inquiry is, what was the intention of the legislature? That intention may be discovered from different signs. As a primary rule it is to be collected from the words. When the words are not explicit it may be gathered from the occasion and necessity of the statute being passed; from a comparison of its several parts and of other acts *in pari materia;* and sometimes from extraneous circumstances which may throw light on the subject.
>
> * * * * *
>
> "It must be presumed that the legislature, in making the amendment, which is not made by altering the verbiage of the section amended as it originally existed, but is by the addition of a new provision, intended by this added provision to make some change in the existing law.
>
> * * * * *
>
> "It must be presumed, further, that in making the amendment the legislature acted with full knowledge of, and in reference to, the existing law upon the same subject and the construction placed upon it by the courts."

It is clear that the presumption referred to is not to be given an effect which is superior to the other principles of statutory construction, namely, that the paramount inquiry in the construction of a statute is to determine the intention of the Legislature and that such intention should be sought in the words employed and the occasion and necessity of the statute being passed. The purpose of this amendment of 1926 has already been pointed out. The Legislature had no intention whatever to modify in any way the limitation in Section 5787.

It should be noted, furthermore, that the Court in *Richmond v. Sutherland, supra,* said that there is simply a presumption that the Legislature intends to make "some" change in the existing law when it amends a statute. We have already pointed out that in enacting the first portion of the amendment of 1926, the Legislature did make a very important change in the law by preventing the abatement of actions against wrongdoers upon their death. It is clear, therefore, that the presumption that the Legislature intended to make "some" change in the existing law, is amply supported in this instance. The Court did not state in *Richmond v. Sutherland, supra,* furthermore, that it is to be presumed that every portion of an amendatory act was intended to make some change in the existing law. If the presumption should be deemed to be that broad, however, it is amply supported in this instance when the purpose of the limitation in the amendment of 1926 is considered. That limitation was undoubtedly intended by the Legislature to be a qualification upon the rights granted by the Legislature in the first portion of the amendment. While it cannot be said that the limitation in that amendment changed the existing law because the law it qualified was not in existence prior to the enactment of the amendment, it certainly can be said that the limita-

tion made an important change in the law as it was modified by the enactment of the first portion of the amendment.

Petitioners respectfully contend, therefore, that the Legislature intended that the limitation in Section 5786 should relate only to actions brought against the estates of deceased wrongdoers and that the limitation in Section 5787 should relate only to actions for wrongful death.

There are a number of Virginia decisions which express and apply the general principle of statutory construction that repeals by implication are not favored by the Courts and that no statute should be deemed to repeal an earlier statute by implication unless the two are irreconcilable.

Scott v. Lichford, 164 Va. 419.
Piedmont Finance Corp. v. Commonwealth, 146 Va. 287.
City of Clifton Forge v. McDaniel, 143 Va. 325.

In the last case cited, the Court said:

> "It is well settled that the repeal of a statute by implication is not favored by the courts. The presumption is always against the intention to repeal where express terms are not used. To justify the presumption of an intention to repeal one statute by another, the two statutes must be irreconcilable. If by a fair and reasonable construction they can be reconciled, both must stand."

Forbes & Co. v. Southern Cotton Oil Co., 130 Va. 245.

In that case, the Court made this statement:

> "It was also argued before us that the statute under consideration (Section 6251) is in conflict with Section 6003, forbidding peremptory instructions directing a verdict. If the two sections can stand together they must. *Black Interp. Laws,* page 363.

> We find no difficulty in harmonizing them. * * * If, however, we were of opinion that the two sections could not stand together, we should be compelled to uphold the validity of Section 6251 as the later of the two acts in the point of enactment; Section 6003 having been simply carried into the Code from the Acts of 1912."

It is clear, therefore, that the limitation in Section 5786, which was enacted in 1926, cannot be deemed to repeal the limitation in Section 5787 by implication, unless it can be said that the two provisions are inconsistent and irreconcilable. If by a fair and reasonable construction they can be reconciled, both must stand.

Petitioners respectfully contend that it has been clearly demonstrated in the preceding pages of the argument of this point that the Legislature intended that these two limitations should apply to different subjects. This construction of the two limitations is fair and reasonable, and if it is adopted they are consistent with each other and can be reconciled.

If petitioners are correct in the contentions which have been set forth in this Brief, it follows that the limitation in Section 5787 is still in full force and effect and that it is the only limitation applicable to this case.

If that is true, the decision of *Manuel, Administrator, v. Norfolk & Western R. Co.*, 99 Va. 188, governs the present case. The plaintiff in that case commenced an action as administrator of the estate of the deceased person. The cause came on for trial more than one year after the death of the plaintiff's decedent and the plaintiff took a voluntary nonsuit because of the absence of a material witness. A few months later, he started another suit and the defendant demurred to his declaration. The Trial Court sustained the demurrer and dismissed the action. The plaintiff's

application for a writ of error was denied by the Supreme Court of Appeals. The Court said:

> "The plaintiff afterwards instituted another action for the same injury. The declaration on its face showed that the second action was instituted more than twelve months after the injury sued for. The Court sustained a demurrer to it, and also to a replication in which the proceedings in the former action were stated, and dismissed the action, on the ground that the action had not been commenced within the time required by section 2903 of the Code (Section 5787).
>
> "Its judgment is plainly right."

So far as counsel for petitioners have been able to learn, the Virginia Court has never been called upon to pass directly upon the same issue since the decision of the Manuel case. On several occasions, however, the Court has expressed its approval of that decision:

> *Dowell v. Cox,* 108 Va. 460.
> *Steffey v. King,* 126 Va. 120.
> *Barley v. Duncan,* — Va. —, 13 S. E. (2nd) 294 (decided February 21st, 1941).

In *Burks on Pleading and Practice* (3rd Ed., 1934), pp. 352, 375, it is said:

> "The action for death by wrongful act is purely statutory, and most of the acts are modeled after Lord Campbell's Act. Where this is true it is said that the action is not the continuation, survival, or revival, of the decedent's cause of action, but is a new and independent cause of action in which the measure of damages is not the same as in an action brought by a decedent, and the time within which the action is to be brought is regulated by statute. In Virginia it is one year from the death of the decedent, and not from the date of the injury."

The Manuel case has never been referred to by the Supreme Court of Appeals of Virginia except with approval. No decision has been found nor heard of in which the decision in that case has been questioned or attacked. Since it was decided in 1901, the Legislature has met twenty times, exclusive of extra sessions, and the limitation in Section 5787 has never been modified since that time except to change "twelve months" to "one year." Petitioners contend, therefore, that inasmuch as the situation presented in the Manuel case was exactly the same as that in the present case and inasmuch as the limitation applicable at that time was the same for all practical purposes as that in effect at the time we are considering, the Manuel case governs the present situation and requires a finding that the present suit is barred by the limitation in Section 5787.

POINT B

If petitioners are incorrect in the contentions stated in Point A, Section 5786 should be construed to mean that a cause of action for wrongful death accrues upon death and not at the time an administrator is appointed for the decedent. This action is barred inasmuch as it was not started within one year after the death of Mrs. Hertz.

In the argument of Point B, it will be assumed that the only limitation applicable to this action is that in Section 5786 which provides that every action under this section shall be brought within one year after the right to bring the same shall have accrued.

The opinion of the majority of the Circuit Court of Appeals states that respondent's right of action did not accrue to him until he was qualified as administrator of his deceased wife, for the reason that a period of limitation for enforcement of a claim does not begin to run

until there is someone in existence capable of enforcing the claim (R. 114). As authority for its decision, the majority of the Court rely on 74 A. L. R. 837, and certain early Virginia decisions (R. 114, 115).

Petitioners respectfully submit, however, that the authorities cited have no bearing upon this situation. None of the cases mentioned involved actions for wrongful death based upon a statute containing its own limitation as in the present case. The annotation in 74 A. L. R. 837, expressly states that the cases and the discussion contained therein do not purport to cover the situation in which an action is brought for wrongful death based upon a statute creating a cause of action where none existed before. An examination of the cases cited in that annotation will show that statement is correct. All of them relate simply to the general statute of limitations.

The early Virginia cases, *Hansford v. Elliott,* 9 Leigh (Va.) 79, *Lyons v. Magagnos,* 7 Gratton (Va.) 377, and *Bowles v. Elmore,* 7 Gratton (Va.) 385, have been overruled and nullified by the enactment of what was originally known as the "Stay Law," which in its present form is Section 5809 of the Virginia Code. This can be demonstrated by a study of the history of that section.

Section 5809 was enacted originally on May 30th, 1861, at the commencement of the Civil War, and was intended to suspend the running of the general statute of limitations for all purposes and in all situations for reasons which will be readily apparent to the Court. In its original form with subsequent extensions, it read as follows:

> "The period between the 17th day of April, 1861 * * * and the 1st day of January, 1869, * * * shall be excluded from the computation of time within which, by the operation of any statute or rule of law, it may be necessary to commence any proceed-

> ings to preserve or prevent the loss of any right or remedy."

In 1888, the statute was amended in such manner as to declare the principle stated in these three Virginia cases. The amendment consisted in the insertion of these words after "1869": "and the period of one year from the qualification of a personal representative." By this amendment, therefore, the Legislature expressly provided that in all circumstances the general statute of limitations should not commence to run until the appointment of a personal representative. In 1895, the act was amended again by striking out the words added in the previous amendment and substituting in their place: "And the period of one year from the death of any party." By this amendment of 1895, therefore, the Legislature expressly terminated the right to bring an action within one year after the qualification of a personal representative. Sometime later the act was amended again by withdrawing the suspension of the statute of limitations for the war years and Section 5809 was thereby put in its present form.

All three of these Virginia cases were decided long before the enactment of the amendment of 1895. The Legislature has, therefore, repudiated the doctrine of those cases that a limitation does not commence to run until there is someone in being who can enforce the claim.

If it could be said, however, that these three cases still represent the law of Virginia, they have no application to the present situation for the reason that they deal with the general statute of limitations and not with a statute creating a right of action and imposing a limitation upon the enforcement of that right.

In order that there may be no confusion petitioners wish to point out that Section 5809 does not relate to nor affect in any way the limitation in the Wrongful Death Act.

Manuel, Administrator v. Norfolk & Western R. Co., 99 Va. 188.
Steffey v. King, 126 Va. 120.
Barley v. Duncan, ... Va. ..., 13 S. E. (2nd) 294.

The Supreme Court of Appeals of Virginia has never decided the question now being considered: In an action for wrongful death based upon a statute creating a right of action where none existed before and imposing a limitation upon the enforcement of that right, does the right of action accrue at the time of death or at the time of the appointment of a personal representative?

In the following cases the Courts of other jurisdictions have construed statutes creating causes of action for wrongful death which contain limitations practically identical to that in Section 5786 of the Code of Virginia. In each one of these statutes it was provided that actions for wrongful death must be brought within a specified time, either one or two years, after the "accrual of the cause of action." In each case it was held that the action was barred because it was not commenced within the required time after death, although it appeared in each case that the action was commenced within the specified time after the appointment of an administrator for the deceased person. The question was squarely presented, therefore, in each case.

Reading Co. v. Koons, Administrator, 271 U. S. 58.
Bickford v. Furber, 271 Mass. 94.
Seaboard Air Line Ry. v. Brooks, 151 Ga. 625.
Faulkner's Administrator v. Louisville & Nashville R. Co., 184 Ky. 533.
Terbush v. Boyle, 217 Wis. 636.
Hanna Administrator v. Jeffersonville R. Co., 32 Ind. 113.

In the second of these cases, the Court said:

> "Within the meaning of the statute the cause of action accrued at the time of his death rather than at the time of the appointment of his administratrix. A cause of action may accrue even if there is then no person legally qualified to enforce it."

A diligent search of the authorities has failed to disclose any decisions of any jurisdiction contrary to these six cases.

The basis of these decisions is, undoubtedly, the fact that the limitation being considered was contained in the statute creating the right of action. In *Bickford v. Furber, supra,* the Court said that the principle that a limitation cannot commence to run until there is someone in existence who can enforce the right of action, is not applicable to a right of action created by the Wrongful Death Act inasmuch as the limitation prescribed in that act is a part of the right and is not a matter of remedy. The Court used these words:

> "Within the meaning of the statute the cause of action accrued at the time of his death rather than at the time of the appointment of his administratrix. A cause of action may accrue even if there is then no person legally qualified to enforce it. * * * As this statute (referring to another Massachusetts act similar to the death act) limited right as well as remedy, the principle laid down in *Bremer v. Williams,* 210 Mass. 256, 96 N. E. 687, that 'before it can began to run there must be someone in existence, by whom, and a different person, against whom, the claim may be enforced,' did not apply."

It is well settled that in Virginia the limitation contained in the provisions of the Death Act is a limitation of the right and is not merely a matter of remedy. It will be recalled that in *Manuel, Administrator, v. Norfolk & Western R. Co.,* 99 Va. 188, the Supreme Court of Appeals held that the Trial Court properly sustained a demurrer to

the plaintiff's declaration. There are several other Virginia cases which declare that a demurrer to a declaration may be sustained only in those instances in which the limitation is a limitation of the right and not merely a matter of remedy, and then only when it appears on the face of the declaration that the action has not been brought within the time limited in the statute creating the right.

Dowell v. Cox, 108 Va. 460.
Leesburg v. Loudoun National Bank, 141 Va. 244.
United States Fidelity Co. v. Blue Diamond Cab Co., 161 Va. 373.

There are numerous other decisions which state that there is no excuse for a failure on the part of either an administrator or the beneficiaries named in the Wrongful Death Act, to start an action within the time prescribed in the act. Some of these decisions contain merely a general statement of that proposition while others declare that certain acts, omissions or events, do not constitute an excuse. In each of these cases, the Court held that the action was barred in spite of the claim made on behalf of the plaintiff that the limitation should be extended.

(1) *Bickford v. Furber,* 271 Mass. 94.

In that case the Court held that the time for commencing an action was not extended by reason of the fact that during a portion of the period there was no administrator of the estate of the plaintiff's decedent nor by reason of the fact that during a portion of that time there was no administrator for the estate of the person who brought about the decedent's wrongful death.

(2) *Rodman v. Missouri Pacific R. Co.,* 65 Kan. 645.

The Court in that case held that the period of limitation was not extended by the fact that a prior suit between

the same parties was removed from the State Court to the United States Court, depriving the former of jurisdiction. That suit was subsequently discontinued by the plaintiff. The Court held that the second suit was barred for the reason that it was not started within the limitation contained in the death act. The Court gave as the reason for its decision that the limitation contained in the statute is a part of the right conferred by the statute.

(3) *Radezky v. Sargent & Co.*, 77 Conn. 110.

In that case it was held that the fact that no administrator of the estate of the decedent was appointed until after the time limited in the death act for bringing an action, did not extend the statutory period. The Court held that the action was barred for the reason that it was not brought within the prescribed time.

(4) *Anthony v. St. Louis I. M. & S. R. Co.*, 108 Ark. 219.

In that case the Wrongful Death Statute permitted the beneficiaries to bring actions in their own names but provided that all actions based upon that act should be brought within two years after death. The beneficiaries in that case were minors and brought suit more than two years after death. The Court held that the action was barred in spite of the fact that another statute gave infants three years to bring an action after the removal of their disability.

(5) *Foster v. Yazoo & Mississippi Valley R. Co.*, 72 Miss. 886.

The facts in that case were similar to those in the preceding case. The Court held that the action was barred.

(6) *Lambert v. Ensign Manufacturing Co.*, 42 W. Va. 813.

In that case the Court said:

> "But here the cause of action did not exist at common law, but is created by statute. The bringing of the suit within two years from the death of the person whose death has been caused by wrongful act is made an essential element of the right to sue, and it must be accepted in all respects as the statute gives it. And it is made absolute, without saving or qualification of any kind whatever. There is no opening for explanation or excuse."

(7) *Rugland v. Anderson,* 30 Minn. 386.

It was said in that case:

> "The right to maintain an action of this kind being created by section 2, c. 77, Gen. St. 1878, is such as that section gives and no other. It is, therefore, subject to the limitation which that section prescribes, viz: that it must 'be commenced within two years after the act or omission by which the death was caused.' To this limitation the statute makes no exception and none can be made by construction."

Petitioners respectfully contend that the foregoing authorities establish without any doubt whatever that the limitation in Section 5786 of the Code of Virginia should be construed to mean that actions for wrongful death must be brought within one year after the death of the decedent. Inasmuch as this action was not brought within that period, it is barred.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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